Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

DAVID BAXTER, Individually, and
THE CITY OF MURFREESBORO,

Petitioners,

vs.

JOHN W. REED AND HENRY SHARBER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE TENNESSEE MUNICIPAL ATTORNEYS ASSOCIATION, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, SHELBY COUNTY, TENNESSEE, THE CITY OF MEMPHIS, TENNESSEE, AND THE CITY OF KNOXVILLE, TENNESSEE, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the attorney client privilege recognized for private corporations in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) protect communications between a city attorney and two city council members, the city manager, and the city fire chief, which involve pending litigation and possible future litigation against the municipality?

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INTEREST OF THE TENNESSEE MUNICIPAL ATTORNEYS' ASSOCIATION, THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, THE CITY OF MEMPHIS, TENNESSEE, THE COUNTY OF SHELBY, TENNESSEE, THE COUNTY OF WILLIAMSON, TENNESSEE, AND THE CITY OF KNOXVILLE, TENNESSEE

The *amici curiae* appear with the written consent of both parties, given in letters which have been filed with the Clerk of this Court. The Tennessee Municipal Attorneys' Association ("TMAA") is a non-profit professional association that provides services and programs to municipal attorneys in the State of Tennessee.[1] The Metropolitan Government of Nashville and Davidson County, the City of Knoxville, Tennessee, and the City of Memphis, Tennessee, are the three largest municipalities within the State of Tennessee, and represent numerous municipal clients. Shelby County, Knox County and Williamson County, Tennessee, are three of the largest county governments in the State of Tennessee with numerous county clients, whose presence in the instant case is warranted given the applicability of the decision to county as well as municipal attorneys.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity other than TMAA made a monetary contribution to the preparation and submission of this brief. The instant amicus brief was prepared by the Metropolitan Department of Law for the Metropolitan Government of Nashville and Davidson County. TMAA provided all necessary funds for the preparation and submission of the instant brief.

The interest of the amici curiae in this case is immediate and direct. If the Sixth Circuit's decision is permitted to stand, municipal and county attorneys will be left in the untenable position of being unable to provide their governmental clients with sound, confidential legal advice without risk of harm to their clients in any subsequent legal actions. The attorney-client privilege is an exception carved out of the common law, specifically designed to promote loyalty and trust between an attorney and a client. The decision by the Court of Appeals for the Sixth Circuit in this case significantly erodes this relationship, to the detriment of the governmental client, and ultimately, to the public the governmental client serves. Therefore, TMAA and the other *amici* have a direct and compelling interest in the outcome of this litigation and thus file this brief in support of Petitioners.

SUMMARY OF ARGUMENT

The instant case is one of first impression which presents to the Court the question of the scope of the attorney client privilege as applied to governmental entities. Petitioner asks the Court to decide whether the attorney client privilege protects communications made at a meeting attended by a city attorney, two city councilmen, the city manager and the city fire chief, at which both pending and potential litigation against the city was discussed. The Tennessee Municipal Attorneys Association (TMAA) unreservedly encourages this court to adopt the arguments enunciated by the Petitioner and the Amicus brief of the International Municipal Lawyers Association that the court determine that the same scope

of the attorney client privilege for private corporations provided in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) be made applicable to public government corporations. TMAA writes separately to discuss important public policy concerns which will undoubtedly arise should this Court decline to hear this matter and fail to reverse the decision of The Court of Appeals for the Sixth Circuit. The attorney client privilege is as important to governments as it is to private corporations for the following reasons: 1) The individual legislators and the chief executive officer of a local government are charged with the obligation to manage and supervise the municipal corporate affairs. The Sixth Circuit's narrow application of attorney client privilege undermines and impedes the free flow of communication between government officials which is necessary to permit individual legislators and the chief executive to fulfill their supervisory obligation. 2) The Sixth Circuit's vague "adverse interest" test to determine the scope of the government attorney client privilege is unworkable in a government setting. Unable to define the motives of individual legislators inquiring about pending or threatened litigation, city attorneys will be unable to respond to individual legislators' and chief executives' queries concerning pending litigation. The city attorney will not be able to determine if the individual legislator's interests are sufficiently in common with the decision-maker to bring that legislator or chief executive within the circle of the privilege. Moreover, the government creates and implements law and policy; a process that must lend itself to differences of opinion and differing positions among the legislators, chief executives, elected officials,

department heads and board members that comprise the governmental client. Despite these differing opinions, all of these government officials are a part of the corporate client, and once in litigation or under the threat of litigation, their communication with their city attorney should be protected by the attorney client privilege in order that the government enjoy the same attorney work product privileges and attorney client communication privileges as the opposing party in the litigation.

ARGUMENT

I. IF THEY ARE TO CARRY OUT THEIR PUBLIC DUTIES, INDIVIDUAL LEGISLATORS AND CHIEF EXECUTIVE OFFICERS OF A CITY MUST HAVE ACCESS TO THE ADVICE AND OPINIONS OF THEIR CITY ATTORNEY AND HAVE ACCESS TO THE GROUNDS FOR A CITY OFFICIAL'S DECISION THAT HAS LED TO LITIGATION OR THE THREAT OF LITIGATION.

In *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998), the Sixth Circuit significantly eroded the attorney-client privilege as it applies to governmental entities. The Sixth Circuit appears to have adopted in *Reed* an even more limited "control group" analysis for governments than the one rejected by this Court for private corporations in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

The attorney-client privilege "serves the function of promoting full and frank communications between attorneys and their clients. Its purpose is to promote loyalty

and trust between an attorney and a client. See *Recent Case*, 108 Harv.L.Rev. 775, 779 n. 39 (1995). It thereby encourages observance of the law and aids in the administration of justice." *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 348, 105 S.Ct. 1986, 1990, 85 L.Ed.2d 372 (1985). The purposes of open communication and loyalty are as applicable to the attorney who represents a government as they are to the attorney who represents an individual client.

The scope of the privilege at issue is governed by Federal Rule of Evidence 501 and Rule 26(b)(3) of the Federal Rules of Civil Procedure. Rule 501 provides that "the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." Rule 26(b)(3) requires the court to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney concerning the litigation. It is well settled that attorney-client privilege extends to private corporations and other organizations. *Upjohn* at 684-86. Further, the structural similarities between a private corporate entity and a governmental entity justify the application of *Upjohn* when determining the scope of the government's attorney-client privilege. Like a corporate attorney, a government attorney represents numerous agencies, departments, officials and employees under the umbrella of the government. However, the ultimate client is always the government itself. When communicating with the government attorney in an official capacity, individual legislators, exactly like members of a board of directors for a private corporation,

are a constituent part of the corporate entity and must always be a "client" of the government attorney.

Reed held that communications made at a meeting attended by the city attorney, city manager, fire chief and two city council members acting solely in their representative capacity, at which they discussed pending litigation involving the city and the threat of related future litigation, are not protected by the attorney-client privilege. In determining that the attorney-client privilege did not include the two council members, the court seemed to rely on the fact that: the council members had no control over the employment decision at issue and the council members requested the meeting to present their constituents' concerns regarding the employment decisions made by the city manager. These factors led the court to conclude the council members' interests were somehow "adverse" to those of the city manager; and thus, the council members were not clients of the city attorney while attending the meeting. Their presence as third parties waived the meeting's confidentiality.

The practical effect of the Sixth Circuit's holding is that, apart from the rare instances when a formal session of a legislative body is closed to the public for an attorney-client conference,[2] city attorneys and government

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[2] The Sixth Circuit expressed its concern in *Reed* that the problems associated with applying the attorney-client privilege to an artificial entity are compounded when the artificial entity is a governmental organization in light of the crucial importance of maintaining an "open and honest government." Though this concern is important, in this case, it grows from a misunderstanding by the Sixth Circuit. In Tennessee, as in many states, communications by elected and appointed officials that

administrators will not be allowed to provide individual legislators with confidential information concerning the litigation. In light of the "special duty" of the Court to "clarify aspects of the law of privileges" *Upjohn*, 101 S.Ct. 677, 689 (Burger, C.J., concurring in part and concurring in the judgment), the *amici* request that the Court settle this important question of federal law and hold that public governmental corporations enjoy the same parameters of the attorney-client privilege as private corporations enjoy.

Legislators and chief executives have the obligation of determining if the government is being managed properly. To make this determination and fulfill their obligations, legislators, mayors and governors require information about managerial decisions. This flow of information will, by necessity, include the advice of counsel regarding managerial decisions on a wide range of issues. The advice of the city attorney regarding pending or threatened litigation will frequently include the attorney's mental impressions, conclusions, opinions, legal theories and predictions as to the outcome of the litigation and other attorney work product. *See* Federal Rule of Civil Procedure 26(b)(3). However, as a result of *Reed*, individual legislators and in certain instances mayors and governors, charged with managing the government will be denied the benefit of the government attorney's legal analysis and all the information relating to the decision-making process of the government's decision-maker.

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may take place outside of a public forum are already severely limited by statutes that regulate public access to governmental meetings and public records. *See, e.g.*, T.C.A § 8-44-101, § 8-44-105.

Under *Reed*, if the city administrators or the city attorney report this information to the individual legislator, the privilege is waived and becomes available to opposing counsel.

In the instant case two individual council members, acting in their representative capacity, met with the city attorney to discuss matters related to the city's litigation and threatened litigation. The court acknowledges the council members were acting in their representative capacity (*Reed*, at 357), but simultaneously ignores what that "representation" entails. Part of a council member's duty includes supervision of decision-making employees including the city manager, the fire chief, and the city attorney present at the meeting at issue. To effectuate this responsibility, open and frank communication of both the advice of the city attorney and the basis for decisions by all employees responsible for carrying out the work of the government is essential. The attorney's advice will include his/her mental impressions, conclusions, opinions, legal theories and predictions as to the outcome of the litigation and other attorney work product. *See* Federal Rule of Civil Procedure 26(b)(3). In order to perform their supervisory obligations the individual legislators required the information and advice the attorney gave to the fire chief and the city manager. Under *Reed*, once information is made available to an individual legislator, it is no longer protected from opposing council.

In practice, the *Reed* decision will have the opposite effect of the one desired by the Sixth Circuit. Under *Reed*, city attorneys will be required to keep confidential any information told to them by governmental employees whose decisions or actions involve potential or threatened litigation. Further, attorneys will be prohibited from

passing on their advice and impressions regarding pending or threatened litigation to individual legislators. In order to preserve the attorney-client privilege the city attorney and the decision-maker will be unable to discuss legal advice, decisions, reasoning, or anything involved with pending or threatened litigation with anyone but each other[3]. Not only individual legislators, but in those instances where the mayor, city manager, or governor is not the ultimate decision-maker, they could not receive this needed information.

II. THE "ADVERSE INTEREST" TEST IS UNDEFINED AND CANNOT BE APPLIED TO LEGISLATORS AND CHIEF EXECUTIVE OFFICERS OF A GOVERNMENT WHEN THE GOVERNMENT ITSELF IS A PARTY TO THE LITIGATION OR THE THREAT OF LITIGATION.

The Sixth Circuit's opinion in *Reed* does not define when government officials' interests are "adverse". It was significant to the court that the two council members requested the meeting to express the concerns of their constituents which ostensibly included the issue of racial preference in promotion. It was also significant to the court that the two council-members could not overrule

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[3] Ironically, the state of the law prior to *Reed* did not discourage the free transfer of information from individual legislators to the public. Prior to *Reed* the individual legislators controlled the privilege and could maintain it or waive it at any moment in any discussion with constituents or on the floor of the legislature. Now individual council members will not be able to share information with the public because in order to maintain the privilege the city attorney and city administrators cannot share that information with them.

the decision of the city manager and fire chief to promote the chosen candidate (council members were not part of the "control group"). Because it is unclear why the council members had an "adverse interest" government attorneys are left wondering who are their clients.

The term "adverse" means "Opposed contrary; in resistance to a claim, application or proceeding; . . . having interests for the preservation of which opposition is essential." Black's Law Dictionary Sixth Ed. St. Paul MN (1990). Two possible interpretations of the term "adverse interest", as that term was used in *Reed*, are either 1) a "conflict of interest" as defined by the State Code of Professional Responsibility or 2) a mere difference of opinion.

The Sixth Circuit seems to imply that the interest of the council members were adverse in the sense of a "conflict of interest". Adverse interests of this nature are subject to the Code of Professional Conduct promulgated and governed by the State Supreme Court and the State Bar. *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990). Peel, an attorney, utilized a letterhead which said, "Certified Civil Trial Specialist By the National Board of Trial Advocacy. Licensed: Illinois, Missouri, Arizona." 496 U.S. at 96, 110 S.Ct. at 2285. Though the majority held that the Ethics rule prohibiting claims of certification was unconstitutional because it regulated commercial speech which was entitled to First Amendment Protection (496 U.S. at 111, 110 S.Ct. at 2293), the dissent written by Justice O'Conner and joined by Justice Scalia and Chief Justice Rehnquist said: "Failure to accord States considerable latitude in this area embroils this Court in the micromanagement of the State's inherent authority to police

the ethical standards of the profession within its borders." 496 U.S. at 119, 110 S.Ct. at 2297. Similarly, the *Reed* decision involves relationships between attorney and client which are governed by the Tennessee State Supreme Court under the Code of Professional Conduct.

Thus, the determination that there was an "adverse interest" at the meeting at issue may lead to astonishing and pejorative repercussions for city attorneys. If the persons in the meeting at issue held truly adverse interests, similar to a "conflict of interest", the attorney for the city would be required to explain his/her role and that his/her primary loyalty was to represent the governmental entity. The attorney would also be required to advise the participants that he/she was no longer able to represent them as a group in the pending litigation and would possibly be conflicted out in any potential litigation due to the adverse interests. A failure on the part of the attorney to do this immediately upon the realization that there were adverse or even the potential for adverse interests would be a breach of the Code of Professional Responsibility. However, under the Tennessee Code of Professional Responsibility attorneys are permitted to represent multiple clients, including corporate representation or a similar entity. Tn. Sup. Ct. R. 8, E.C. 5-18. The Code of Professional Responsibility demands that an attorney remove himself/herself from representation when the interests are so adverse that interests of another client of the attorney's will be impaired. Tn. Sup. Ct. R. 8, D.R. 5-105. The Sixth Circuit's decision involves Federal Courts in an area governed by the state through prohibiting, under a Federal Rule of Evidence, Rule 501, the exact behavior permitted under Tennessee's Code of Professional Responsibility.

In the alternative the Sixth Circuit meant "adverse interest" to mean difference of opinion. However, the existence of several different opinions or viewpoints of the various city officials does not mean that these officials of the city 1) do not have common interests[4] or 2) that they have such adverse interests as not to be part of a corporate client but, instead, third parties. The Sixth Circuit is very clear that the council members were acting in their representative capacity. *Reed*, at 357. The council members had received complaints from their constituents about the promotion process and in their capacity as elected officials were investigating the basis (if any) of these complaints. *Id.* Contrary to the Sixth Circuit's opinion, the city attorney should assume that all the participants in the meeting were interested in determining how the City of Murfreesboro could both obey the law and fulfill the needs of its constituents. However, in pursuing this common goal department heads, legislators, and executives may all voice widely differing opinions on what is right, what is popular, and what is appropriate. Legislators questioning government administrators is in the best interest of the public and should be encouraged, not discouraged. Limiting the attorney-client privilege

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[4] This is in direct opposition to the determination in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997) where the President's wife, acting in her **personal** capacity, accompanied by her personal attorney met with White House attorneys to discuss a matter in which she faced criminal conviction. *Id.* at 922-923 (emphasis added). Because the President's wife was acting in her **personal** capacity, the court concluded she was not a client of the White House attorneys and communications at these meeting were not privileged. *Id.* at 922. (emphasis added)

discourages this kind of questioning. This is not a case which presents "adverse interests". It is a case which demonstrates the variety of opinions present on even a single local employment issue in a representative government and the legislators' fulfillment of their duties as representatives of the people to engage in thoughtful well-informed supervision of government administrators. This Court should grant the writ of certiorari, reverse the decision of the Sixth Circuit and include public government corporations within the same scope of the attorney-client privilege provided private corporations in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981).

CONCLUSION

The attorney-client privilege should extend to governmental entities and their clients in the same manner in which the privilege is extended to corporate entities. The judgment of the Sixth Circuit in *Reed v. Baxter* should be reversed.

Respectfully submitted,

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APPENDIX

Rule 501. Federal Rules of Evidence

GENERAL RULE

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Rule 26. Fed.R.Civ.P.

General Provisions Governing Discovery; Duty of Disclosure

(b)(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative including the other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in

the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

TENN. CODE ANN. § 8-44-101. Policy – Construction

(a) The general assembly hereby declares it to be the policy of this state that the formation of public policy and decisions is public business and shall not be conducted in secret.

TENN. CODE ANN. § 8-44-105. Action nullified – Exception.

Any action taken at a meeting in violation of this part shall be void and of no effect; provided, that this nullification of actions taken at such meetings shall not apply to any commitment, otherwise legal, affecting the public debt of the entity concerned. [Acts 1974, ch. 442, § 5; T.C.A., § 8-4405.]

Rule 8 Tennessee Supreme Court Rules; Disciplinary Rule 5-105.

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer. – (A) A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with that lawyer or that lawyer's firm may accept or continue such employment.

Rule 8 Tennessee Supreme Court Rules; Ethical Consideration 5-18.

EC 5-18. A lawyer employed or retained by a corporation or similar entity owes allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and the lawyer's professional judgment should not be influenced by the personal desires of any person or organization. Occassionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent that person in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.